# IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

## CRIMINAL APPEAL No. 1940 of 2004
## With
## CRIMINAL APPEAL No. 1941 of 2004

**For Approval and Signature:**

**HONOURABLE MR.JUSTICE A.M.KAPADIA**

**HONOURABLE MR.JUSTICE K.A.PUJ**

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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**MAHMAD RIYAZ NUR MAHMAD - Appellant(s)**
**Versus**
**THE STATE OF GUJARAT - Respondent(s)**

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**Appearance :**

MS SADHANA SAGAR appointed by Free Legal Aid Committee for Appellant in both the appeals
MR KT DAVE ADDL. PUBLIC PROSECUTOR for Respondent in both the appeals

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**CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA**

**and**

**HONOURABLE MR.JUSTICE K.A.PUJ**

**Date : 12/03/2007**

**COMMON ORAL JUDGMENT**
**(Per : HONOURABLE MR.JUSTICE A.M.KAPADIA)**

1. Challenge in these two appeals filed under Section 374 of the Code of Criminal Procedure ('the Code' for short) is to the correctness of the judgment and order dated 8.10.2004 rendered in Special (NDPS) Case No.10 of 2003 by the learned Special Judge (NDPS), Fast Track Court No.9, District Bharuch by which the appellant of both the appeals, original accused Nos.2 and 1 respectively, ('the accused' for short) have been convicted for commission of the offences punishable under Sections 8 (c ), 20 (b)(ii)(B) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('the NDPS act' for short) and sentenced to suffer RI for ten years and fine of Rs.50,000/- each i.d, RI for further period of

one year.

2. Briefly stated, the prosecution case as disclosed from the complaint as well as unfolded during trial, is as under:

2.1. P.W.9, Pradipbhai Jamnadas Sarang, P.I. Incharge LCB Bharuch, Ex.32, when he was on duty on 17.9.2003 received a secret information from the informant that persons named Samim Ismail Sabool Shaikh (accused No.1) and another person (accused No.2) are engaged in illegal trafficking of drugs on a black coloured scooter bearing registration No.GJ-4A-1000 and they were to come to Bharuch with narcotic substance from ABC four junction to Shital circle. He, therefore, recorded the secret information in the register kept for the said purpose and informed PSI KM Joseph, ASI PM Thakor and Police Constable Pratapsinh Devatsinh and Police Constable Himanshu Rashikant to remain present in the LCB Office. They were also asked to make arrangement

of two panchas. The said secret information was conveyed to the panchas as well as other police personnels who were called at A Division Police Station of Bharuch. Accordingly the preliminary panchnama was prepared.

2.2. After completing the preliminary panchnama, they went to the place from where both the persons named in the secret information were to come. At about 1.25 P.M. both the said persons were seen coming on the said scooter which was described in the secret information. They both were apprehended and arrested and thereafter P.W.9 has informed about the secret information received by him. Both of them were informed that he is a gazetted officer and he is empowered to search the person of the accused. However, if they desire that they shall be searched by another gazetted officer or an Executive Magistrate, he will make arrangement for the same. However, the accused opted that P.W.9 may search them. Accordingly, P.W.9 searched both the

accused persons in presence of the panchas and other police personnels. During the search of the person of both the accused nothing incriminating was found. However, from the dickey of the scooter, contraband article ganja wrapped in a plastic bag was found and on weighing, it was found to be 2 KG and 70 grams and the net weight of it was 1 Kg. 950 grams on removal of the plastic bag. Thereafter necessary formalities of seizure, sealing and arrest of both the accused were completed and accordingly the second part of the panchnama was prepared.

2.3. A complaint for the aforesaid incident was lodged by P.W.9 before LCB Bharuch against both the accused for commission of the offences punishable under sections 8 (c ), read with section 20 (b) (ii) (B) and Section 29 of the NDPS Act. The said complaint was registered vide CR No.232 of 2003 at LCB Police station, Bharuch.

2.4. On registration of the complaint,

investigation was put into motion. During the course of investigation, statement of witnesses was recorded, sample of the contraband article ganja which was recovered from the accused was sent to FSL for analysis. On receipt of the analysis report from FSL certifying that the muddamal sent for analysis was ganja and as incriminating evidence was found against the accused persons both the accused persons were charge-sheeted before the Special Court (NDPS) Bharuch.

2.5. The learned Special Judge (NDPS) Bharuch to whom the case was made over for trial, framed charge against the accused persons for commission of the offences punishable under sections 8 (c ) read with Sections 20 (b) (ii) (B) and 29 of the NDPS Act. The charge was read over and explained to the accused persons. The accused persons pleaded not guilty to the charge and claimed to be tried and thereupon they were put to trial by the learned Special Judge (NDPS),

Bharuch in Special NDPS Case No.10 of 2003.

2.6. To prove the culpability of the accused, the prosecution has examined in all 10 witnesses and relied upon their oral testimonies, the details of which have been given in para 4 of the impugned judgment and order.

2.7 In order to prove the charge levelled against the accused, the prosecution has also produced in all 15 documents and relied upon the contents thereof, the details of which have been narrated in paragraph 5 of the impugned judgment and order.

2.8. After recording of the evidence of the prosecution witnesses was over, the trial Court explained to both the accused the circumstances appearing against them in the evidence of the prosecution witnesses and recorded their further statement under Section 313 of the Code. In their further statement they denied the case of the

prosecution in toto. They have stated that they have been falsely implicated in the case. They have not committed any offence. However, they have neither led any evidence nor examined any witness to support their defence.

2.9. On appreciation, evaluation, analysis and scrutiny of the evidence on record, the trial court held that it is proved by the prosecution beyond reasonable doubt that when both the accused were intercepted and apprehended, 1 kg 950 grams of Ganja was found from the dickey of the scooter. Therefore, complicity of both the accused for commission of the offence under the NDPS Act, has been proved and hence both the accused have been convicted for commission of the offences punishable under sections 8 (c ) read with Sections 20 (b)(ii) (B) and 29 of the NDPS Act and imposed sentence on them to which reference is made in earlier paragraph of this judgment giving rise to these appeals, being Criminal Appeal No.1940 of 2004 filed by accused No.2 and Criminal Appeal No.1941 of 2004 filed by

accused No.1 from jail.

3. Ms. Sadhna Sagar, learned advocate appointed by Free Legal Aid Committee for the accused persons in both the appeals, at the outset submitted that she does not challenge the order of conviction on merits. However, she challenges the order of sentence. According to her, the contraband article Ganja which was recovered from both the accused persons was less than commercial quantity. She submitted that from the accused persons Ganja of less than 2 Kg was recovered. However, the trial court imposed the maximum sentence of ten years and, therefore, the sentence imposed on the accused persons is disproportionate to the guilt of the accused. She also submitted that both the accused have undergone more than 3 ½ years imprisonment. Therefore, while upholding the conviction, sentence may be reduced to the extent they have undergone and accordingly these appeals may be allowed qua sentence only.

4. Mr. KT Dave, learned APP for the respondent State of Gujarat, has candidly submitted that it is true that the quantity of ganja recovered from the accused persons jointly is less than 2 Kg. As per notification dated 19.10.2001, at Item No.55, small quantity and commercial quantity of Ganja is mentioned as 1000 grams i.e., 1 KG of Ganja is a small quantity whereas 20 Kg of Ganja is a commercial quantity. So far as both the accused are concerned, 1 Kg. 950 grams of Ganja was jointly recovered from them. Therefore, he urged that appropriate order giving benefit of rationalized sentencing structure as per the NDPS (Amendment) Act, 2001 may be imposed on them. Therefore he urged to pass appropriate order.

5. This Court has considered the submissions advanced by the learned advocates appearing for the parties and perused the impugned judgment and order. This court has undertaken a complete and

comprehensive appreciation of all vital features of the case and the entire evidence on record which is read and re-read by the learned advocates appearing for the parties with reference to broad and reasonable probabilities of the case. In light of caution sounded by the Supreme Court while dealing with NDPS Cases, this court has examined the entire evidence on record for itself independently of the trial court and considered the arguments advanced on behalf of the accused and infirmities pressed, scrupulously with a view to find out as to whether the trial Court has rightly recorded the order of conviction and sentence.

6. Since Ms. Sadhna Sagar, learned advocate for the accused persons, has not challenged the order of conviction recorded against the accused persons on merits, this Court has to examine the sole contention as to whether the trial Court has rightly sentenced both the accused persons, under Section 8 (c ) read with Sections 20(b)(ii) (B) and 29 of the NDPS Act i.e., sentenced both

the accused considering the quantity of the contraband article Ganja recovered from both the accused, weighing 1 Kg. 950 grams.

7. At the outset be it noted that the NDPS Act, 1985 as amended by NDPS (Amendment) Act, 2001 is amended with a view to rationalize the sentence structure so as to ensure that while drug traffickers who traffic in significant quantities of drugs are punished with deterrent sentences, the addicts and those who commit less serious offences are sentenced to less severe punishment. The statement of objects and reasons of the NDPS (Amendment) Act, 2001 is that Narcotic Drugs and Psychotropic Substances Act, 1985 provides deterrent punishment for various offences relating to illicit trafficking in narcotic drugs and psychotropic substances. Most of the offences invite uniform punishment of a minimum ten years rigorous imprisonment which may extend upto twenty years. While the Act envisages severe punishments for drug traffickers, it envisages reformative approach towards addicts. In view of

the general delay in trial it has been found that the addicts prefer not to invoke the provisions of the Act. The strict bail provisions under the Act add to their misery. Therefore, it is proposed to rationalize the sentence structure so as to ensure that while drug traffickers who traffic in significant quantities of drugs are punished with deterrent sentences, the addicts and those who commit less serious offences are sentenced to less severe punishment. This requires rationalization of the sentence structure provided under the Act. It is also proposed to restrict the application of strict bail provisions to those offenders who indulge in serious offences.

8. There is no dispute that from both the accused, quantity of 1 kg. 950 grams of Ganja was jointly recovered, which is admittedly not a commercial quantity and also not a small quantity. As per the notification - SO 1055 (E) dated 19.10.2001, at Serial No.23, the quantity of 1000 grams Ganja is a small quantity

whereas quantity of 20 kg. Ganja is a commercial quantity. Therefore, it cannot be disputed that the quantity of 1 kg. 950 grams of Ganja found from both the accused was neither a small quantity nor a commercial quantity. Therefore, trial Court ought to have convicted and sentenced both the accused under Section 20(b)(ii)(B) of the NDPS Act taking into consideration the rationalized sentence structure. However, the trial Court, without considering this aspect, has imposed sentence of RI for ten years, which is the maximum sentence, which according to us, is disproportionate to the quantity found from both the accused. Recovery of contraband article Ganja weighing from 1.kg. 001 gram upto 19.999 grams would invite punishment under section 20 (b) (ii) (B) of the NDPS Act as the quantity is lesser than the commercial quantity but greater than small quantity and the punishment can be RI for a term which may extend to ten years, and with fine which may extend to one lakh rupees. In instant case, the quantity of contraband article Ganja

recovered from both the accused persons jointly is 1 Kg. 950 grams. In these circumstances, the rationalized sentence structure is required to be considered. Therefore, according to this court, the punishment imposed on the accused persons is disproportionate to the quantity of contraband article recovered from them. Therefore, according to us, if both the accused are sentenced to suffer R.I. for three years and fine of Rs.50,000/- i.d., R.I. for further period of three months, it would meet the ends of justice.

9. Seen in the above context, both the appeals deserve to be allowed partly qua sentence only by reducing the sentence as mentioned in the earlier paragraph.

10. For the foregoing reasons, both the appeals succeed in part and accordingly they are partly allowed. While upholding the order of conviction recorded against the accused for commission of offences under sections 8 (c ) read with sections 20 (b) (ii) (B) and 29 of the NDPS

Act, the sentence is altered by reducing the same and accordingly both the accused are sentenced to suffer RI for 3 years and fine of Rs.50,000/- and i.d., to undergo RI for further period of three months.

11. Ms. Sadhna Sagar, learned advocate for the accused, states that since both the accused have undergone total period of sentence of more than 3 ½ years, appropriate order, directing the jail authorities to release both the accused may be passed.

12. Mr. K.T. Dave, learned APP for the respondent – State of Gujarat, on the basis of the jail remark sheet, endorsed by saying that both the accused have undergone total period of sentence of 3 years 5 months and 21 days so far.

13. In view of the statement made by Ms. Sadhna Sagar, learned advocate for the appellant in both the appeals, which is endorsed by Mr. K.T. Dave, learned APP for the respondent – State of Gujarat, at the bar, as per the jail remark

sheet, since both the accused have undergone total period of sentence of 3 years 5 months and 21 days, jail authorities are directed to set both the accused at liberty forthwith, if their presence is not required in connection with any other case.

(A.M. Kapadia, J.)

(K.A. Puj, J.)

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